

**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**BETTY LOU ZIRKLE CARPENTER,**  
**Plaintiff/Appellee,**

**v.**

**Case No. 34497**

**SHIRLEY BLANIAR LUKE**  
**Defendant/Appellant.**

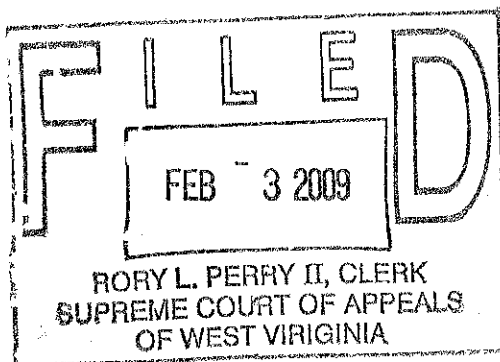
---

**REPLY BRIEF OF APPELLANT SHIRLEY BLANIAR LUKE**

---

Julie Gower Romain  
WV State Bar ID # 5544  
211 Adams Street, Suite 600  
Fairmont, WV 26554

Counsel for Appellant,  
Shirley Blaniar Luke



Amy N. Daugherty  
WV State Bar ID # 9566  
Edmund L. Wagoner  
WV State Bar ID # 10605  
Steptoe and Johnson PLLC  
PO Box 2190  
Clarksburg, WV. 26302-2190

Counsel for Appellee  
Betty Lou Zirkle Carpenter

**No. 34497**

**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**BETTY LOU ZIRKLE CARPENTER,**  
**Plaintiff/Appellee,**

**v.**

**Case No. 34497**

**SHIRLEY BLANIAR LUKE**  
**Defendant/Appellant.**

---

**REPLY BRIEF OF APPELLANT SHIRLEY BLANIAR LUKE**

---

Appellant Shirley Luke submits this Brief in reply to the responsive Brief of the Appellee, Betty Lou Zirkle Carpenter.

**I. ISSUE**

The issue in this case is whether the boundaries for a parcel of real estate, used and occupied by the Appellant and her family without dispute for the thirty-five years prior to this action, should be located according to the descriptions set forth in the seven deeds executed since 1922 regarding the two adjacent parcels involved in dispute, or if such real estate should be situated as described in what is alleged to be an eighty-five year old original public document, in the Appellee's possession, not recorded in any public office, and not attached to, or mentioned in, any deed in the chain of title to either parcel.

## **II. PROCEDURAL HISTORY**

This civil action was brought by Plaintiff, now Appellee Betty Lou Zirkle Carpenter, seeking declaratory relief before the Circuit Court of Harrison County on or about December 18, 2006. In her Complaint, Plaintiff sought a ruling by the Court that she is the owner of real estate located in Harrison County, West Virginia, based upon boundary lines set and recorded prior to the alleged relocation of a roadway in 1922, not consistent with deeds created and filed after the alleged 1922 relocation of the roadway, and based upon a map of such relocated roadway, purported to be a public document, not of record in the office of the Clerk of the Harrison County Commission and possessed only by Appellee. Appellee further sought to compel the Appellant from making any claims of ownership of the disputed real estate, particularly to potential purchasers to whom the Appellee sought to sell such real estate. Appellant filed her timely Answer to the Complaint, asserting as her Sixth Defense that she is the successor in title to a bona fide purchaser of the disputed real estate. Following discovery, both parties moved the Court for summary judgment. Appellee sought partial summary judgment on the basis that the McCoy survey of Appellant's property was incorrect and alleging that the McCoy land survey was the only basis for Appellant's claim of ownership. Appellant sought summary judgment on the basis that her predecessor in title, her

father, who prior to his death had conveyed his real estate, including the portion which forms the basis for this action, to the Appellant, was a bona fide purchaser of the disputed real estate without notice of any claims of ownership by Appellee or her predecessor in title, Oren Zirkle. Alternatively, Appellant argued that if the Appellee was the true owner of the real estate, Appellant's father, and the Appellant after him, had adversely possessed the property for over 30 years.

The Court denied both motions for summary judgment and the matter proceeded to trial by jury. At the conclusion of the presentation of testimony and evidence at the trial of this matter, the Court entered judgment in favor of the Appellee, pursuant to West Virginia Rule of Civil Procedure Rule 54(b), finding that there was no reason for delay of judgment in favor of the Appellee as to the ownership of the real estate. Thereafter, the Court advised the jury, in its jury instructions, that the Court had determined that the Appellee was the owner of the disputed real estate and the matter was sent to the jury only for determination of Appellant's alternative claims of adverse possession and prescriptive easement. The jury found that the Appellant had not adversely possessed the real estate and had not obtained an easement by prescription. The jury was never given an opportunity to make a decision regarding whether the jury thought the Defendant was the true owner of the disputed real estate.

Within ten days of the Court's decision pursuant to West Virginia Rule of Civil Procedure Rule 54(b), Appellant filed her motion to alter or amend judgment pursuant to West Virginia Rule of Civil Procedure Rule 59 and motion for new trial pursuant to West Virginia Rule of Civil Procedure Rule 59. In Rose v. Thomas Memorial Hospital Foundation, Inc., 208 W.Va. 406; 541 S. E. 2d 1 ( 2000), this Court found "(a) motion for reconsideration filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for appeal is so extended, its full length begins to run from the date of entry of the order disposing of the motion." Rose v. Thomas Memorial Hospital Foundation, Inc., 208 W.Va. 406,412; 541 S. E. 2d 1,8 ( 2000), citing *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995). By Order dated December 18, 2007, the Court denied Appellant's motion to alter or amend judgment and motion for a new trial. Appellant thereafter filed her Petition for Appeal with this Court and the same was Granted.

### **III. STATEMENT OF THE CASE**

The parcel or tract of land in dispute in this case is located along State Route 3 in Harrison County, West Virginia. Appellee's father, Oren Zirkle, prior to his death in 2005, owned and occupied a parcel of real estate lying on the eastern side of State Route 3. Appellee inherited the real estate from her father. Appellant

owned and occupied a parcel of real estate situate opposite the Zirkle property on the western side of State Route 3. The Appellant was also given her real estate by her father, Kenneth Luke, who purchased it in 1972. Kenneth Luke financed the purchase of his real estate with a local bank and the release of the Deed of Trust was entered into evidence at the trial of this matter. In her brief, Appellee concedes that the issue of whether Kenneth Luke paid consideration for the property is not in dispute. In 1988, Kenneth Luke conveyed the real estate to his daughter, the Appellant. All deeds in the chain of title for the Appellee and Appellant's survey made partly in reliance upon those deeds, recite that their respective property boundary lines begin at the center of the roadway. No deed in either chain of title recites that the boundary lines cross the roadway at any point. ( See testimony of Betty Carpenter, P. 44-47)

The disputed portion of real estate is part of an area of land which was previously reclaimed by the Department of Natural Resources in 1987 and which makes up about ninety percent of the Appellant's front yard, including her driveway and any viable access to the public road. At trial, Appellant introduced evidence showing that prior to the 1987 reclamation, the Appellant's sons played in the reclaimed area, then boggy and swampy, the Appellant kept her dog in doghouses in the usable portions of the area and the Appellant mowed the portions of the

property which were not too swampy. Following the reclamation, and in 1988, based on the Appellant's testimony, or in 1987, according to the Appellee's testimony, the Appellant fenced the disputed real estate, built a driveway to her home through the disputed real estate, parked her vehicles, and particularly her camping trailer on the disputed real estate, and commenced the regular mowing and upkeep of that land. In support of her claims of ownership, Appellee introduced evidence that at some point during the 1950's she and her family had a picnic on the disputed real estate on one occasion. Pursuant to Appellee's testimony, Appellee's father attempted no use of the disputed real estate from 1972 until his death in 2005. He did, however, contact the State Department of Highways to ask them to clean a culvert which ran under the roadway abutting the disputed property when it became clogged and caused water to come onto the roadway. Furthermore, occasional visitors to the Zirkle home would park along the roadway near the disputed piece of property for short periods of time when they visited. Mr. Zirkle himself did not park his vehicle on the property directly across the roadway from his home, but rather, parked at a nearby church parsonage, with church permission, from 1963 until his death. ( See testimony of Betty Carpenter P. 30-31)

Following the death of Oren Zirkle, Appellee now claims ownership of the real estate owned, occupied, and used by Appellant and her father before her during

the thirty-six years since their purchase in 1972. In support of her claims Appellee produced in discovery and at the trial of this matter a document purporting to be a map of the roadway which is State Route 3, and which purports to show that the roadway was moved from a prior location and to its current location in 1922. Appellee testified that this was an original document kept by her family and that it was given to the Grantee each time the family real estate changed hands. ( See testimony of Betty Carpenter, P. 5, 32 ) Appellee gave no explanation of how a public document purporting to have been prepared by the Office of County Road Engineers came to be in she or her family's possession or how the Appellant is to be charged with knowledge of this secret family document. The document relied upon by Appellee is unrecorded, bears no Deed Book or Map Book number or page number and no testimony was presented to support that it was ever of record in the office of the Clerk of the Harrison County Commission. In fact, Appellee's surveyor testified as to the content of each Deed introduced by both of the parties and verified that such document was not recorded with, or referred to, in any Deed reviewed by him in the chain of title. Appellee however contends that all deeds from 1922 to the present, which refer to the boundary lines of the respective properties beginning at the center of the roadway, necessarily refer to the location of the roadway prior to 1922, based upon that unrecorded document. In support of her claim of ownership of the disputed real estate, Appellee also produced



photographs showing vehicles sitting along Route 3 near the property during the 1950s and a picnic taking place on the property prior to its 1972 purchase by Kenneth Luke. Appellee was unable to produce any photographs which depicted Appellee, her father, or anyone else acting with their permission or on their behalf, using the property at any time other than the 1950s, and prior to Kenneth Luke's purchase of the real estate in 1972. Appellee's father made no improvements to the property during his lifetime.( See testimony of Betty Carpenter, P. 30,42) Appellee produced no written communication between her father, Oren Zirkle and Appellant indicating his objection to Appellant's use of the disputed property and testified that she was never present at any time when Oren Zirkle verbally advised the Appellant that he objected to her use of property he claimed was owned by him. ( See testimony of Betty Carpenter, P. 11,15,37 )

In her Answer and in motions for summary judgment prior to trial and at the trial of this matter, Appellant argued that even if the document purporting to be a map of a relocation of the roadway was genuine and depicted the accurate location of the roadway prior to 1922, Kenneth Luke, Appellant's predecessor in title, was a bona fide purchaser of the property. Appellant introduced into evidence at trial, the deeds to the real estate conveyed to Kenneth Luke and thereafter the Appellant and the deeds from 1922 and thereon conveying real estate to Oren Zirkle and his

predecessors in title. No deed in the chain of either title recites that the boundary of the Appellee's property crosses the roadway, either prior to or after its alleged relocation. Furthermore, Appellee's surveyor, Mr. Jackson, testified that he examined all of the deeds in both the Luke and Zirkle chains of title and that he found none that had attached to it the map upon which Appellee relies in support of her claim of ownership. See testimony of David Jackson P. 26-38 ) Furthermore, Appellee's surveyor testified that he relied in part upon the Appellant's own survey of her real estate. That survey shows that if the Zirkle boundaries are located as beginning at the centerline of State Route 3 as it sits today, then the disputed real estate is owned by the Appellant. ( See Exhibit A)

In further support of her claim of ownership of the property, the Appellee argued that Appellant made use of the disputed property only with the permission of her father. Appellee was unable to state a date or time or year when such permission was given or produce a writing which documented such permission. Furthermore, Appellee testified that although she did not hear her father give the Appellant permission to use the property, she was certain that "he must have". ( See testimony of Betty Carpenter, P. 11 ) Appellee also presented the testimony of family friends who testified that Oren Zirkle had told them he was the owner of the disputed property. However, no such witnesses were able to state that those claims

had been made in the presence of the Appellant or her father. No testimony that the Appellant acknowledged any right of ownership in Appellee or her father was elicited and Appellant denied any such right.

Appellant's survey, relied upon in part by Appellee's surveyor, found that the real estate in dispute was owned by Appellant. ( See testimony of David Jackson P 14-16) Appellant testified that neither she nor her father had any notice of a claim of ownership of the property by Oren Zirkle. Appellant introduced into evidence the released Deed of Trust showing that Kenneth Luke had paid good and valuable consideration for the real estate, in support of her claim that Kenneth Luke was a bona fide purchaser without notice of any claims by the Appellee or her predecessors.

At the close of evidence the Court found that the Appellee was the owner of the disputed real estate and entered final judgment as to that issue pursuant to West Virginia Rule of Civil Procedure Rule 54, noting the Appellant's objection. The issue of ownership of the property was not submitted to the jury. However, the Court did publish its decision that the Appellee is the owner of the property to the jury in its jury instructions. Within ten days of entry of judgment in favor of the Appellee pursuant to Rule 54 by the Court, the Appellant filed her motions to

amend or alter judgment and for a new trial pursuant to West Virginia Rule of Civil Procedure Rule 59 and the same were denied.

#### **IV. STANDARD OF REVIEW**

In this case, the Court, after hearing the evidence, made a finding in favor of Appellee. Appellant appeals the Court's application of the law in this case. Appellant sought both a new trial and alteration of the Court's judgment pursuant to Rule 59 and was denied. "Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence. Reynolds v. City Hospital Inc., 207 W.Va. 101, 104; 529 S. E. 2d 341 (2000), citing Syl. pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976). This Court, in Reynolds stated the standard of review of an order denying a new trial, finding that "We noted recently in *Gum v. Dudley*, 202 W. Va. 477, 482, 505 S.E.2d 391, 396 (1997), that in reviewing an order denying a new trial, we review "the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo." Id., citing Accord Syl. pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

## **V. ARGUMENT**

The primary question in this case is whether the boundary of the Appellee's property should be located as recited in the deed given to her father in 1960, who thereafter bequeathed the property to the Appellee in 2005, or according to a document which Appellee asserts is a public document, the original of which is in Appellee's sole possession, and which is not recorded anywhere in the office of the Clerk of the County Commission of Harrison County, and particularly not recorded with any deed in Appellee's or Appellant's chain of title.

At the trial of this case the Circuit Court found in favor of the Appellee as a matter of law and did not submit the issue of ownership of the disputed property to the jury. In support of her claim of ownership of the disputed real estate, the Appellee produced an original document alleged to have been made in 1922 and alleging to show that the roadway which is now West Virginia Secondary Route 3 was previously located somewhere other than its current location. No other evidence of the alleged relocation of the roadway was produced by Appellee. This document was not recorded in connection with or attached to any deed relied upon by either of the parties. The only person who knew about this document prior to this action were the Appellee and her family. The Appellant asserts that since she and her father, who conveyed this real estate to Appellant in 1988, had no knowledge of this

secret Zirkle family document at the time of Kenneth Luke's purchase of the property or thereafter, and since they had no notice of any claim to, or use of, the property by any other party, the Appellant's father and she after him are bona fide purchasers of the disputed real estate.

In her *Brief of Appellee Betty Lou Zirkle Carpenter* the Appellee argues that if there was no evidence admitted by the Appellant to show the location of the property line other than as asserted by the Appellee, based upon the 1922 document, then she must be correct. However, Appellee ignores the fact that when Kenneth Luke purchased his property in 1972, the deed conveying the Appellee's real estate to her father, Oren Zirkle, in 1960 read that his boundary line began at the center of the roadway and proceeded opposite the Luke property. The roadway in place in 1960 when Oren Zirkle was conveyed his real estate was State Route 3 in its current location. The Oren Zirkle deed boundaries do not cross the roadway. No reasonable person would believe, or be put on notice, or even imagine that the location of the roadway referred to in the deeds is other than State Route 3. To believe otherwise would assume that the Zirkle home was built in the middle of the turnpike alleged to have been moved in 1922 and that that same turnpike, if it existed, made a 90 degree turn in the middle of a swamp. "(T)he parties to a deed are presumed to have in mind the actual state of the property conveyed at the time of the execution of the deed, and therefore are supposed to refer to this for a proper definition of the

terms used in the descriptive words.” Yonker v. Grimm, 101 W.Va. 711,719; 133 S. E. 695,699 (1926). “ A deed is to be interpreted and construed as of its date and a call in the descriptive portion thereof for an adjoining tract of land is a call for the true location of such adjoining tract at the date of the deed.” Id. at 720. According to the testimony of the Appellee’s own surveyor, this 1922 document relied upon by the Appellee was not recorded in the Harrison County Clerk’s office anywhere and especially not in association with any deed. “In general a party without actual notice may rely upon record titles in the office of the clerk of the county commission of the county in which the land is located.” Eagle Gas Co. v. Doran & Associates, Inc., 182 W. Va. at 194.197; 387 S.E.2d 99,102 ( 1989). None of the photographic evidence of either of the parties, including the 1953 photograph introduced by the Appellee, show that there was any evidence or even a remnant of the roadway remaining on the property in 1953 or thereafter. The surveys of both the Appellant and the Appellee depict the roadway in its current location. The Appellee misstates the burden she must meet in order to prove that Kenneth Luke or his daughter, the Appellant, had any notice of her claim to the disputed property based upon her unrecorded 1922 document. “ When a claim to protection as a bona fide purchaser for value without notice is involved, the burden is on the party denying the validity of the purchase to prove notice of his equity and upon the other party to prove good faith and payment of an adequate consideration.” 1 *Michie’s Jurisprudence*, Vendor

and Purchaser, citing Cassiday Fork Boom & Lumber Co. v. Terry, 69 W.Va. 572, 73 S.E. 278 ( 1911) at *Syl. Pt.3*. The Appellee's burden at the trial of this case was to show that Kenneth Luke, when he purchased the property in 1972, had some notice of the Appellee's claim of ownership. No such claim was evident from the deeds. Oren Zirkle made no improvements to the property that would put a reasonable person on notice of his claim of title. Appellee testified that:

Q. Okay, do you have any receipts ma'am for money that your father spent making improvements to that property?

A. No, he didn't make improvements. Maybe he left is as it was, I don't know.

( Trial Transcript of Testimony of Betty Lou Zirkle Carpenter, P 10)

Oren Zirkle made no attempts to maintain the property that would have put a reasonable person on notice of his claim of title. Appellee testified that:

Q. Do you have any receipts for money that your father spent-- first of all do you have any photographs of your father mowing and doing any upkeep on that property?

A. My father hadn't been mowing for years. He had asthma.

Q. Do you have any receipts for individuals that your father paid to mow that part of the property?



A. No.

( Trial Transcript of Testimony of Betty Lou Zirkle Carpenter, P 10)

Oren Zirkle never made a claim of ownership of the property to the Appellant in the presence of anyone. Appellee's claims that the disputed real estate was used only with her father's permission are misleading. Any such permission was unspoken and never communicated to those using the disputed property. Specifically, in her direct testimony, the Appellee stated:

Q. But officially the property did go from the Jones to Ms. Luke or some of her family living there, is that correct?

A. Yes.

Q. Okay and when they lived there at least up until 1907 (sic) the driveway was on the right side, is that correct?

A. The path was, after the Lukes moved in they put a driveway up through there.

Q. And did your father have any objections to them having a driveway there?

A. No he didn't complain to the owner anything about it. They had to get into the property. Jones had used it. We had neighbors. You know when you are neighbors you do things for each other and you know, he allowed it to happen yes.

( Trial Transcript of Testimony of Betty Lou Zirkle Carpenter, P 10).

The Appellee further testified that:

Q. Okay, and I guess my question was did your father as far as you know and basically your father was getting angry about it and that she wasn't heeding his words were you present with any conversations your father had with Ms. Luke about the driveway?

A. No, I was not.

( Trial Transcript of Testimony of Betty Lou Zirkle Carpenter, P 15).

Appellee also testified that:

Q. You said a couple of times during your testimony you stated that you are sure that your father went to Ms. Luke and objected about her use of the property but you were not present for any of those were you?

A. No, but I talked to him. He never lied to him.

Q. Okay, but you weren't present?

A. No.

Q. And you didn't hear those conversations?

A. No.

( Trial Transcript of Testimony of Betty Lou Zirkle Carpenter, P 36-37).

Just like the Appellee, no other witness was able to testify at trial that they had

ever heard Oren Zirkle make any claim of ownership of the disputed real estate in the presence of Appellant. By the Appellee's own testimony above, he made no use of the property. Appellee's statement in her *Brief of Appellee Betty Lou Zirkle Carpenter* that "various witnesses testified that Appellee's father had openly treated the Disputed Tract as his own from the time he took ownership" is an exaggeration at best. The only evidence of any claim of ownership of the property by anyone other than the Appellant or her father before her is the one made by the Appellee now, thirty-five years after Kenneth Luke purchased the property and based upon an eighty year old document. In her *Brief of Appellee Betty Lou Zirkle Carpenter* Appellee attempts to fault the Appellant for including in her Brief citation to cases about adverse possession where this Court previously defined the type of notice required to show another's claim to, or use of, real property. The Appellee misstates the Appellant's motives. The cases cited by the Appellant merely set forth the clearest and most concise definitions of "notice" regarding the type of use of real property which would put another on notice of a claim of ownership by another previously made by this Court. Appellant and her counsel are under no delusion that this Court can be so easily misled.

In her *Brief of Appellee Betty Lou Zirkle Carpenter*, Appellee argues that Appellant did not make her claims of ownership as a bona fide purchaser. Appellee ignores Appellant's SIXTH DEFENSE in her Answer and further fails to

acknowledge that Appellant included her status as a bona fide purchaser as a basis for summary judgment in favor of the Appellant in her motion for summary judgment. Had this issue proceeded to the jury, they would have been given Appellant's proposed jury instructions regarding Appellant's status as a bona fide purchaser, if the same were allowed by the Court.

Appellee further argues that since the jury found that the Appellant was not an adverse possessor of this property, then they would have also found that Appellant was not the bona fide purchaser owner. The question of ownership of the property was never put to the jury. The Appellee ignores the possibility that the jury disagreed with the Court and were of the opinion that the Appellant was the true owner. The Appellee also fails to state that the Court published its decision to the jury, stating that the Court was of the opinion that the Appellee was the owner of the disputed real estate. The jury was put in the uncomfortable position of deciding whether to disagree with the trial judge. The Appellant therefore submits that the jury's finding regarding adverse possession has no bearing upon Appellant's status as a bona fide purchaser.

## **VI. CONCLUSION**

Appellee testified that she wants to sell her father's real estate and asked the Court for declaratory relief to prevent the Appellant from speaking to potential

purchasers. It stands to reason that Appellant can sell her property for a higher price if the Appellant's land is included. Her motives are even more clear when you consider that Appellee testified that her father parked at a nearby church parsonage for forty-two years rather than on this parcel of real estate Appellee claims he owned. Appellee argues that the boundary of her late father's real estate must be located as beginning at the centerline of a roadway gone now some eighty years and known only to the Appellee, because the Appellant did not rebut her claims. Appellant disagrees. The only roadway in existence at the time of the deeds conveying real estate to Oren Zirkle in 1960, and to Kenneth Luke in 1972, was State Route 3 in its current location. The burden was on the Appellee to show that Kenneth Luke or even Shirley Luke had notice that the centerline of the roadway where the Zirkle boundary begins was located other than the centerline of State Route 3 in its location in 1972 when Kenneth Luke purchased the property. Alternatively, the Appellee could have presented evidence that Kenneth Luke had notice that another party was making use of the property to the extent that it would have been reasonable for Kenneth Luke to make further inquiry regarding the ownership of the property. Additionally, the Appellee could have presented evidence to show that Kenneth Luke verbally received notice that some other party claimed title to the property. However, the Appellee's testimony was that her father never made improvements to the property, never maintained the property and that

she never heard him made any objections to the Luke's use of the property in their presence. The Appellant's survey shows that if the Zirkle boundary line is located as beginning at the center line of State Route 3 as it sits today, then the disputed real estate is owned by the Appellant.

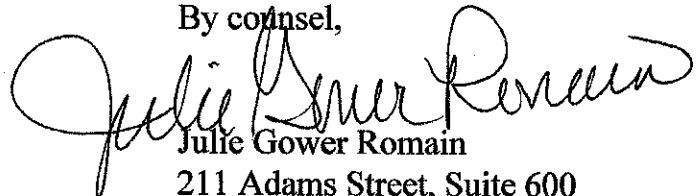
#### **VII. PRAYER FOR RELIEF**

Wherefore the Appellant, Shirley Blaniar Luke respectfully moves this Court to reverse the judgment entered as a matter of law by the Circuit Court of Harrison County and remand this case for trial.

Respectfully submitted this 2<sup>nd</sup> day of February, 2009.

Shirley Luke, Appellant

By counsel,

A handwritten signature in cursive script, appearing to read "Julie Gower Romain", is written over the printed name.

Julie Gower Romain

211 Adams Street, Suite 600

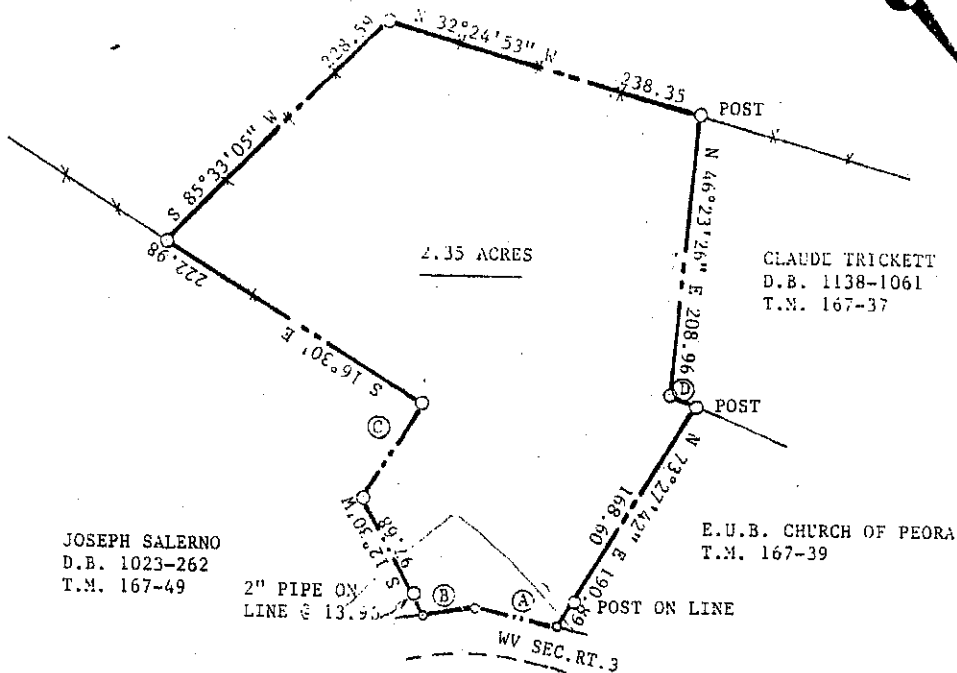
Fairmont, WV. 26554

WV State Bar ID #5544

LINE	CHART
A = S. 37° 53' 37" E	54.99
B = S. 57° 15' 30" E	38.95
C = S. 71° 15' 00" W	82.50
D = N. 26° 55' 27" W	20.40

BOOK 1305 PAGE 1195

HOWARD MILLER  
D.B. 1017-474  
T.M. 167-31



JOSEPH SALERNO  
D.B. 1023-262  
T.M. 167-49

CLAUDE TRICKETT  
D.B. 1138-1061  
T.M. 167-37

E.U.B. CHURCH OF PEORA  
T.M. 167-39

NOTE: ALL CORNERS 1" IRON PINS SET,  
EXCEPT WHERE NOTED.  
DEED REF. 1189-143  
TAX MAP 167-38

PLAT OF 2.35 ACRES

SURVEYED FOR

SHIRLEY BLANIER

EAGLE DIST. HARRISON CO. WV

SCALE 1"=100' NOVEMBER 1998

HARRISON COUNTY, WV  
FILED

December 07, 1998 11:09:42

SYLVIA BASILE  
COUNTY CLERK  
TRANSACTION NO: 1998153511

DEED BOOK  
Book: 01305 Page: 01195  
Line: 00001

PAUL D. HARBERT, PS  
MCCOY LAND SURVEYING  
MONONGAH, WV

HARBERT, INC. 98252

EXEMPT

Director  
HARRISON COUNTY PLANNING COMMISSION  
Date  
DES 7, 1998

EXHIBIT

A

12-8-98 Shirley Blanner PO Box 315 Union WV 26431

## TABLE OF CONTENTS

	PAGE NO.
I. ISSUE.....	2
II. PROCEDURAL HISTORY.....	3
III. STATEMENT OF THE CASE.....	5
IV. THE STANDARD OF REVIEW REVIEW.....	12
V. ARGUMENT.....	18
VI. CONCLUSION.....	20
VII. PRAYER FOR RELIEF.....	22
TABLE OF AUTHORITIES.....	i



## **TABLE OF AUTHORITIES**

WEST VIRGINIA RULE OF CIVIL PROCEDURE RULE 54b.....	4,5,11
<u>Rose v. Thomas Memorial Hospital Foundation, Inc.</u> , 208 W.Va. 406; 541 S. E. 2d 1 ( 2000).....	5
<u>Reynolds v. City Hospital Inc.</u> , 207 W.Va. 101, 104; 529 S. E. 2d 341 (2000).....	12
<u>Eagle Gas Co. v. Doran &amp; Associates, Inc.</u> , 182 W. Va. at 194;197, 387 S.E.2d 99,102( 1989).....	15
<u>Yonker v. Grimm</u> , 101 W.Va. 711,719; 133 S. E. 695,699 (1926).....	15
<u>Cassiday Fork Boom &amp; Lumber Co. v. Terry</u> , 69 W.Va. 572, 73 S. E. 278 (1911)..	16

**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**BETTY LOU ZIRKLE CARPENTER,**

**Plaintiff/Appellee,**

**v.**

**Case No. 34497**

**SHIRLEY BLANIAR LUKE**

**Defendant/Appellant.**

**CERTIFICATE OF SERVICE**

I certify that I have this 2<sup>nd</sup> day of February, 2009 served a true and accurate copy of REPLY BRIEF OF APPELLANT SHIRLEY BLANIAR LUKE upon counsel for the Appellee by depositing the same in the United States Mail with sufficient postage attached thereto and addressed to:

Amy N. Daugherty  
Edmund L. Wagoner  
Steptoe and Johnson PLLC  
PO Box 2190  
Clarksburg, WV. 26302-2190

Counsel for Appellant

Shirley Blaniar Luke

  
Julie Gower Romain

WV State Bar ID # 5544

211 Adams Street, Suite 600

Fairmont, WV 26554